1968 change, however, some federal credit unions, including petitioners' union, had their charters amended in the original language of the 1967 Amendment.

2. This case arises out of a dispute between petitioners and the Administration over the meaning of the 1967 Amendment prior to the 1968 change. The Administration originally chartered Forbes Credit Union in 1956 to serve civilian and military personnel employed at or permanently assigned to Forbes Air Force Base in Topeka, Kansas. In April 1967, soon after the availability of the 1967 Amendment had been publicly announced, Forbes applied for permission to adopt the Amendment. The Administration approved the application on May 5, 1967.

Petitioners claimed that, under a literal reading of the 1967 charter amendment, Forbes was entitled to enroll as credit union members any and all military personnel "eligible by law or regulations to receive benefits or services" from Forbes Air Force Base, regardless of whether they ever in fact received benefits or services. Under this interpretation, Forbes could enroll all military personnel located anywhere in the world, since all are theoretically "eligible" to receive benefits and services at any military base. The Administration, on the other hand, insisted that the 1967 Amendment extended Forbes' "field of membership" only to those persons who actually received benefits or services from Forbes Air Force Base.

Despite a warning from the Administration, Forbes determined to conduct business in accord with its expansive interpretation of the 1967 Amendment. In

May 1969, Forbes established an office at Sewart Air Forces Base in Tennessee, where it conducted extensive business and enrolled some 1,150 new members. While some of these new members were eventually transferred to Forbes Air Force Base, others were never transferred there and were eventually assigned to other military installations.

The Administration issued a "Notice of Charges" to petitioners on July 13, 1971, charging them with improperly expanding Forbes' membership. A Hearing Examiner upheld the Administration's position and ruled that petitioners were required to follow the Administration's interpretation of the 1967 Amendment (Pet. App. A18–A53). The Administrator adopted the Examiner's recommended decision and issued a cease-and-desist order applicable prospectively only (Pet. App. A15–A17).

3. The court of appeals affirmed the Administration's order. It held that the Administration's interpretation of the 1967 Amendment was compelled by "the statutory provision that a federal credit union shall serve a described territory [12 U.S.C. 1753(2), (5)] and that its members shall have a 'common bond,' one with the other [12 U.S.C. 1759], as that phrase has been consistently interpreted by the Administrator" (Pet. App. A13). The court noted that "no administrative body may contract with a corporate body which it regulates in a manner contrary to the statute which it is charged with administering" (Pet. App. A12), and that, in determining the meaning of a statute, great weight must be accorded to the

authoritative interpretation of the agency charged with administering it (Pet. App. A12–A13).

ARGUMENT

The court of appeals' decision is correct, and further review is not warranted.

1. Petitioners argue that the Administration's cease-and-desist order conflicts with the 1967 Amendment to Forbes' charter. The Hearing Examiner found, however, that the Administration's interpretation of the 1967 Amendment gives effect to the contemporaneous explanation which accompanied the Administration's first offer of the Amendment to the credit union industry (Pet. App. A39–A40). Under settled principles of contract law, the 1967 Amendment must be interpreted to conform with that explanation. See, *e.g.*, *Lloyd* v. *Grynberg*, 464 F. 2d 622, 624–625 (C.A. 10); *Boston & Maine R.R.* v. *Hall*, 284 F. 2d 474, 477–478 (C.A. 1), certiorari denied, 365 U.S. 817, 818; *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.*, 178 F. 2d 541, 552 (C.A. 9); Restatement of Contracts (Second), § 240, comment b (Tent. Draft No. 5, 1970); 3 *Corbin on Contracts*, §§ 543, 579 (1960).

Moreover, there can be no doubt of the Administration's authority to insist that petitioners abide by the agency's long-standing administrative interpretation of the statutory "common bond" requirement (12 U.S.C. 1759). The 1967 Amendment to Forbes' charter was necessarily subject to that limitation. See *Wood* v. *Lovett*, 313 U.S. 362, 370; *Home Building & Loan As-*

sociation v. *Blaisdell*, 290 U.S. 398, 429–430; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550. The Act contemplates that the Administrator will prescribe "rules and regulations" governing qualifications for credit union membership (12 U.S.C. 1759). The Administration's insistence that petitioners abide by the "common bond" limitation, as it had been consistently interpreted by the agency, is thus not an "impairment" of the 1967 charter amendment within the meaning of the Fifth Amendment.[4]

The Administration has long interpreted the "common bond" requirement to restrict the membership of credit unions located at military installations to persons who actually receive some benefits or services from the particular installation where the credit union is located. This interpretation furthers the purposes of the Act by encouraging direct local participation

[4] There is nothing to petitioners' claim (Pet. 17) that the Administration has inconsistently added the words "and are receiving" to the 1967 Amendment for some, but not all, credit unions. The Hearing Examiner found (Pet. App. A45–A46) that the 1967 Amendment had been approved for initial issuance to credit unions only in its amended form, with the words "and are receiving" added, after July 1967. The Administration "considers all fields of membership of DOD credit unions to be equal in scope in this regard, whether they contain the words 'and are receiving' or not * * *" (Pet. App. A46). For this reason, there is no merit in petitioners' suggestion (Pet. 7, 17) that the Administration acknowledged the validity of their interpretation of the 1967 Amendment when the agency's Regional Director assented in January 1970 to their request that the clarifying words "and are receiving" not be added to Forbes' charter (see Pet. App. A44.)

in credit union management.[5] See S. Rep. No. 555, 73d Cong., 2d Sess., p. 2. The contrary interpretation urged by petitioners, permitting the extension of credit union services to any and all military men located around the world, is at odds with established patterns of practice in the credit union industry and the Administration's authoritative interpretation of the meaning and purpose of the Act. Moreover, petitioners' claims of authority to operate world-wide are inconsistent with the requirement in 12 U.S.C. 1753(2) that a federal credit union serve a described territory.

2. Petitioners argue (Pet. 16–17) that the Administration's interpretation of the 1967 Amendment is, in effect, a charter amendment made contrary to the procedures in 12 C.F.R. 701.4. The agency's interpretation is not an amendment of the charter, however; it simply interprets the charter in accordance with the originally understood meaning and intention of the 1967 Amendment. Further, as noted above, the

[5] Petitioners complain (Pet. 19–20) that some early credit unions were granted expansive membership fields to provide needed credit union services to large and dispersed groups of military officers. The Hearing Examiner found (Pet. App. A44):

"* * * in the early days [these credit unions] were the only ones serving the military. Thus, these broad fields of membership were considered both necessary and in conformity with the occupational 'common bond' requirement of the Act."

The federal credit union industry has grown, and, with the development of credit unions at local military installations, it has become possible to provide adequate credit union services to military men while achieving the local control and participation in credit union affairs which Congress desired.

agency's interpretation constitutes a reasonable construction of the statutory requirement—to which the charter of Forbes Credit Union has always been subject—that membership in a federal credit union be limited to persons who have a "common bond" (12 U.S.C. 1759). The order enforcing the agency's interpretation does not in any way restrict or amend the authority conferred by the 1967 Amendment.[6]

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[6] Petitioners also claim (Pet. 18–19) that the Administration's interpretation cannot be upheld as an exercise of rule-making, since the agency did not follow the formal rule-making procedures of the Administrative Procedure Act, 5 U.S.C. 551, *et seq.* This contention was not raised in the proceedings before the Administration or in the court of appeals. It is therefore not properly before this Court. *Lawn* v. *United States*, 355 U.S. 339, 362–363, n. 16; *Brown* v. *United States*, 411 U.S. 223, 230, n. 4. In any event, the contention is without merit.

The rule-making requirements of Section 4 of the Administrative Procedure Act, now 5 U.S.C. 553, do not apply where there is involved "a matter relating to * * * contracts." 5 U.S.C. 553(a)(2). Since the Administration's interpretation of the 1967 Amendment relates to a contract—*i.e.*, the Forbes charter (see *Dartmouth College* v. *Woodward*, 4 Wheat. 518)—it is excepted from Section 4 of the Administrative Procedure Act. See *Brown* v. *Housing Authority of the City of Milwaukee*, 471 F. 2d 63, 67–68 (C.A. 7); *Hahn* v. *Gottlieb*, 430 F. 2d 1243, 1247, n. 4 (C.A. 1). The agency's interpretation was enforced prospectively against petitioners only after they had been given a full adjudicatory hearing. The Hearing Examiner found that petitioners had long known of the agency's interpretation (Pet. App. A47), and there is no question that that interpretation is binding on petitioners. See, *e.g.*, *Kessler* v. *Federal Communications Commission*, 326 F. 2d 673, 689–690 (C.A.D.C.); *United States* v. *Aarons*, 310 F. 2d 341, 345–348 (C.A. 2); Davis, *Administrative Law Treatise*, § 6.10 (1958 ed.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

ROBERT E. KOPP,
EDWIN E. HUDDLESON, III,
Attorneys.

SEPTEMBER 1973.

APPENDIX

The relevant portions of the Federal Credit Union Act, 48 Stat. 1216, *et seq.*, as amended, 12 U.S.C. 1751, *et seq.*, provide:

§ 1753. *Federal credit union organization.*

Any seven or more natural persons who desire to form a Federal credit union shall subscribe before some officer competent to administer oaths an organization certificate in duplicate which shall specifically state:

(1) the name of the association;

(2) the location of the proposed Federal credit union and the territory in which it will operate;

* * * * *

(5) the proposed field of membership, specified in detail;

* * * * *

Such organization certificate may also contain any provisions approved by the Administrator for the management of the business of the association and for the conduct of its affairs and relative to the powers of its directors, officers, or stockholders.

§ 1754. *Approval of organization certificate.*

The organization certificate shall be presented to the Administrator for approval. Before any organization certificate is approved, an appropriate investigation shall be made for the purpose of determining (1) whether the organization certificate conforms to the provisions of this chapter; (2) the general character and fitness of the subscribers thereto; and (3) the economic advisability of establishing the pro-

posed Federal credit union. Upon approval of such organization certificate by the Administrator it shall be the charter of the corporation, and one of the originals thereof shall be delivered to the corporation after the payment of the fee required therefor. Upon such approval the Federal credit union shall be a body corporate and as such, subject to the limitations herein contained, shall be vested with all of the powers and charged with all of the liabilities conferred and imposed by this chapter upon corporations organized hereunder.

§ 1759. *Membership.*

Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Administrator as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and the entrance fee; except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district. Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member.

§ 1766. *Certain powers of Administrator and Administration personnel.*

(a) The Administrator may prescribe rules and regulations for the administration of this chapter (including, but not by way of limitation, the merger, consolidation and dissolution of corporations organized under this chapter).

(b)(1) The Administrator may suspend or revoke the charter of any Federal credit union, or place the same in involuntary liquidation and appoint a liquidating agent therefor, upon his finding that the organization is bankrupt or insolvent, or has violated any of the provisions of its charter, its bylaws, this chapter, or any regulations issued thereunder.

* * * * *

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-173.

BOARD OF DIRECTORS AND OFFICERS, FORBES FEDERAL CREDIT UNION, CHARTER NO. 11258, FORBES AIR FORCE BASE, TOPEKA, KANSAS,
Petitioners,

v.

NATIONAL CREDIT UNION ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REPLY BRIEF OF PETITIONERS.

EDWARD C. TOOLE, JR.,
FLOYD W. TOMPKINS,
CLARK, LADNER, FORTENBAUGH & YOUNG,
17th Floor, Widener Building,
Philadelphia, Pennsylvania. 19107
Counsel for Petitioners.

Of Counsel:
DALE W. BRUCE,
DAVIS, BRUCE, DAVIS & WINKLER,
1622 Union Center Building,
Wichita, Kansas. 67202

International Printing Co., 711 So. 20th St., Phila., Pa. 19146 — Tel. (215) 735-9711

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Respondent.

REPLY BRIEF OF PETITIONERS.

The Board of Directors and Officers, Forbes Federal Credit Union, Petitioners, submit this brief in reply to the arguments first raised in the brief for the Respondent in opposition to the petition, as authorized by Rule 24.4.

I.

CONTEMPORANEOUS EXPLANATION OF THE CHARTER AMENDMENT.

The Government contends (Resp. p. 8) that a *contemporaneous explanation* accompanied the Administration's "interpretation" of the 1967 Amendment to the Forbes Charter. By "contemporaneous explanation" the Government is referring (via the Hearing Examiner's

Finding of Fact No. 4 Pet. App. A 23) to one of the informal, unofficial "bulletins" which, as the uncontroverted evidence establishes, was *never* received by Forbes' officers and directors and accordingly, could not equitably be regarded as "notice" either actual or constructive, of its contents (Tab 36, pp. 45-46, 48-50, 232-233). The record before the Agency below is completely devoid of evidence of any legally supportable "contemporaneous explanation" as asserted by the Government.

The issue therefore remains, namely, whether a regulatory agency can unilaterally amend a charter provision by merely characterizing its actions as "explanatory".

II.

LONG-STANDING INTERPRETATION.

The Government further asserts (Resp. pp. 8-11) that the Administration could "insist" upon obedience to its "long-standing" administrative interpretation of the common bond requirement. However, there is no evidence whatsoever that such a "long-standing" policy ever existed. To the contrary, the evidence unequivocally demonstrates that:

1. No regulations have *ever* been promulgated by the Administration interpreting the "common bond", although Congress expressly authorized the National Credit Union Administration to issue regulations as it may deem necessary for the administration of the statute. See 12 U. S. C. § 1766(a);

2. The Administration has granted charters where the words "and are receiving" have been included, *as well as* where this phrase has been omitted (Tab 37, R 9-10);

3. In fact, as recently as July of 1973, the Administration granted a charter to a Federal credit union where the

common bond has been expressly approved calling for a *nationwide* field of membership (Pet. pp. 19-20).

Thus, the issue remains, namely, whether an administrative agency can impose restrictions which fall outside the enabling statute, and without any clearly discernible pattern of consistency, but rather, in an arbitrary and selective manner.

III.

ESTABLISHED PATTERNS OF PRACTICE.

The Government asserts that the interpretation of the common bond as urged by petitioners, is at odds with the "established patterns of practice" in the credit union industry (Resp. p. 10). However, it has been established of record that *at least* two major credit unions, specifically, the Pentagon F. C. U. and the Navy F. C. U. have had their charters construed by the Administration so as to permit world-wide field of membership. The explanation of historical necessity as proffered by the Government (Resp. p. 10, n. 5) is hardly persuasive, in light of the national field of membership recently approved by the Administration in another profession-related credit union (Pet. pp. 19-20).

Thus, the issue remains, namely, whether the Administration can unilaterally modify the Federal Credit Union Act by inconsistently imposing a geographical limitation upon profession-related credit unions such as Forbes, contrary to the express language of the statute.

IV.

THE COMMON BOND.

The Government states (Resp. p. 11) that the membership in the Forbes Federal Credit Union is limited to persons who have a "common bond". This is in no way contested by petitioners. However, this is defined in 12

U. S. C. § 1759 as "groups having a common bond of occupation or association,

or

to groups within a well-defined neighborhood, community or rural district." The clear intent of the statute is that the former membership group (based on occupation or association) needs *no* geographical limitation, while the latter group (based on neighborhood, community or rural district), is by definition, geographically limited.

Thus, the issue remains, namely, can the Administration attempt to impose conditions and limitations on professionally associated credit unions, contrary to the express language of the statute.

V.

THE ADMINISTRATIVE PROCEDURE ACT.

The Government asserts (Resp. p. 11, n. 6) that Forbes failed to raise in the Court below, the fact that the Administration did not follow the formal rule-making procedures of the Administrative Procedure Act, 5 U. S. C. § 551 et seq. This is simply incorrect. To the contrary, this was briefed and argued before the Court of Appeals (see Reply Brief of Petitioners, p. 4), as well as before the Hearing Examiner (Tab 36, pp. 48-49).

Thus, the issue remains, namely, whether an administrative agency may impose substantive conditions and restrictions by means of an informal "bulletin" contrary to the rule-making process expressly mandated by Congress in the Administrative Procedure Act, as well as in the Federal Credit Union Act.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD C. TOOLE, JR.,
FLOYD W. TOMPKINS,
CLARK, LADNER, FORTENBAUGH & YOUNG,
17th Floor Widener Building,
Philadelphia, Pennsylvania. 19107
Counsel for Petitioners.

Of Counsel:
DALE W. BRUCE,
DAVIS, BRUCE, DAVIS & WINKLER,
1022 Union Center Building,
Wichita, Kansas. 61202